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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

INDIANAPOLIS POWER & LIGHT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER, INDIANAPOLIS POWER & LIGHT COMPANY

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QUESTIONS PRESENTED

The statement at page 2 of the brief for the Board of questions presented is neither accurate nor complete. There are five separately numbered questions stated at pages 31-33 of the petition for certiorari as questions presented by the petition. Questions 4 and 5 (pp. 32-33 of petition) are ignored in the brief for the Board. The

first two questions stated in the Board's brief are not accurate restatements of questions 1 and 2 stated at pages 31-32 of the petition and are not the actual questions which the record presents on those subjects. The third question stated in the Board's brief on the matter of sufficiency of the evidence to support the findings in question does not include subsidiary findings of the Board as does number 3 stated at page 32 of the petition.

Comparison

Substance of the Questions Stated in Petition	Substance of the Questions Stated in Board's Brief
1. In respect to the Board's findings relating to *generating plant employees* (not those relating to the disposed of radio station) whether "recent rulings of the Supreme Court" rendered the lower court "powerless to disturb" the Board's findings (as both opinions below hold) and precluded it from making its own independent determination of the question of the legal sufficiency of the evidence to support said findings.	1. Whether it was held below that the court was without power to determine whether the Board's findings (not limited to those relating to generating plant employees) are supported by substantial evidence.
2. Whether there was such departure from the usual and accepted course of judicial proceedings in this type of case, by the lower court's failure to make its own independent determina-	2. Whether the lower court was required to set out in its opinion "the evidence supporting the Board's findings of unfair labor practices."

tion of the question whether said findings (those relating to generating plant employees) are supported by substantial evidence and by its failure to point out in its opinion "legally sufficient evidence" to support said findings so as to call for the exercise of this court's power of supervision.

3. Whether said findings (relating to generating plant employees), including the subsidiary findings, are supported by substantial evidence.

3. Whether there was substantial evidence to support the Board's findings that petitioner discriminatorily discharged two employees, in violation of Section 8 (3) and (1) of the Act, and engaged in other conduct violative of Section 8 (1).

4. Whether the Board must overcome with evidence the direct and positive evidence showing a reasonable and lawful explanation of the lay-off of Collier and Elbreg, who admitted they had not informed management of their union affiliation and of whose affiliation management had no knowledge, and whether the finding of discriminatory discharge may stand in the absence of such contrary evidence.

(Ignored.)

5. Whether the plant engineer's unwillingness to discuss wages with a "group" of six unorganized employees, months before there was any organizational activity, constituted a violation of their rights as guaranteed by Section 7 of the Act.	(Ignored.)

Each of the five questions stated at pages 31-33 of the petition is warranted by the record, and is of importance in the administration of the National Labor Relations Act, as well as of importance in this particular case.

STATEMENT OF THE CASE

The "STATEMENT" at pages 3-9 of the brief for the Board is far from adequate either as a basis for determining whether the petition for certiorari should be granted or as a basis for determining any of the questions presented on the merits. For a full and correct statement of the case, including a statement of the evidence, and lack of it, relating to the subject matter of the findings in question, attention is respectfully directed to the "Concise Statement of the Case" which appears at pages 2-22 of petitioner's brief.

Some of the important facts omitted from the statement in the brief for the Board and some of the errors therein will now be shown. The statement at pages 7-22 of petitioner's brief includes the omitted matters and correct statements of the evidence with specific references to the Record.

Omitted in connection with the incident referred to at page 3 of the Board's brief, when early in 1937 a plant

engineer expressed unwillingness to confer with six unorganized employees as a group on the subject of their wages, are the facts that this occurred several months before there was any organization activities; that there is no evidence that petitioner ever refused to engage in collective bargaining with any representatives chosen by its employees, but on the contrary petitioner did bargain collectively and contract with the first and only labor organization that asked for recognition; that petitioner was not charged with refusing to bargain collectively and no effort was made to disestablish the labor organization with which the contract was made.

Omitted in connection with the remarks of the then plant engineer (Goodrich) and of other supervisory employees referred to at pages 3-4 of the Board's brief, is the fact that when it became apparent to the management in July, 1937, (after said remarks are said to have been made) that generating plant employees were talking about organization while on duty and killing time on account of it, the plant engineer (Goodrich) reported the situation to the General Manager and that the President and the General Manager then determined the company's authoritative policy to be that the employees "*could join or not join, do as they liked about joining organizations, but they must not hold any meetings or carry on any meetings on the company property,*" and that Goodrich was instructed to call a meeting of said plant employees and communicate those instructions to them; that Goodrich called such meeting on July 8, 1937, and so told the employees at that meeting.

The statement at page 4 of the Board's brief that petitioner favored and supported the employees' organization, permitted it to solicit members on company time

and property and that supervisory employees conveyed to subordinates petitioner's approval of that organization, has no support whatever in the evidence and is exactly contrary to what the Board's own witnesses, Gipe and Kirkpatrick, testified to (App. B, pp. 70-112, and pp. 112-128). The trial examiner expressly found (App. A, p. 61) that "The evidence does not support the conclusion, however, that respondent itself encouraged the formation of the Association or coerced its employees into joining it, as alleged in the complaint."

Omitted in connection with that part of the statement dealing with Collier and Elbreg (pp. 4-6, Board's brief) are the following undisputed important facts: That neither Collier nor Elbreg had ever informed anyone in the management that they were affiliated with U. W. O. C.; that there is no evidence whatever that prior to or at the time of their lay-off anyone in the management knew they were so affiliated; and that Goodrich, who selected them for lay-off along with many others, testified that he had no knowledge that either of these men belonged to that union until long after they were laid off. Omitted also in this connection is the fact that in a series of written orders in late 1937 the General Manager required all department heads to reduce personnel due to the economic recession of that time and that in one of these orders he furnished the basis on which selections for lay-offs should be made as follows:

> "In laying off plant employees, however, the generating system as a whole is to be the governing basis. That is, all plant employees should be considered on the basis of merit, efficiency and length of service with the company. Necessary transfers between plants should be made as far as possible to accomplish this policy."

Omitted also is the fact that Goodrich testified that all those laid off pursuant to the General Manager's orders, including Collier and Elbreg, were selected on the foregoing basis in the exercise of management judgment, without any knowledge or thought of their affiliation, or non-affiliation, with any labor organization; that a total of 70 were so laid off, of which number, it was revealed thereafter, five belonged to U. W. O. C., and 54 to the employees' Association.

It is entirely clear that the Board has at no time considered the "whole complex of activities" or based its decision "on the totality of the Company's activities during the period in question". See, *N. L. R. B. v. Virginia Electric & Power Co.*, — U. S. —, 86 L. Ed. 309, 311.

ARGUMENT

The argument in the brief for the Board is confined to the three questions which are set forth at page 2 of that brief. In this reply brief under the heading of "Questions Presented" it has been made clear that there are five separately numbered questions presented by the petition, and that those numbered 4 and 5 are completely ignored by the brief for the Board.

Question number 4, ignored in the Board's brief, is the basis for specification of error numbered 4 (p. 23, petitioner's brief), and is the subject matter of Proposition 4 (pp. 30-31, petitioner's brief). Said Proposition 4, along with Proposition 3, is the subject of the argument extending from pages 47 to 60 of petitioner's brief. Petitioner believes that said question numbered 4 and what is said therein in petitioner's brief, should receive consideration because of the importance of that question in the administration of the Act as well as in this particular case.

Question number 5, ignored in the Board's brief, is the basis for specification of error numbered 5 (p. 24, petitioner's brief), and is the subject matter of Proposition 5 (pp. 31-32, petitioner's brief). Said Proposition 5 is argued at pages 60-61 of petitioner's brief. Petitioner believes said question numbered 5 should receive the consideration of the court because of its importance in the administration of the Act as well as in this case.

Question number 1, as it is stated in the petition (pp. 31-32) is the basis for specification of error numbered 1 (pp. 22-23, petitioner's brief), and is the subject matter of Proposition 1 (pp. 25-27, petitioner's brief). Said Proposition 1 is argued at pages 33-44 of petitioner's brief. At

pages 37-40 the part of the Court's last opinion dealing with findings pertaining to *generating plant employees* is set forth. It is clearly apparent from that part of the opinion that the lower court deemed itself precluded (erroneously) by "recent rulings of the Supreme Court", particularly by rulings in *N. R. L. B. v. Link-Belt Co.*, 311 U. S. 584; 85 L. Ed. 368 and *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206; 84 L. Ed. 704, from setting aside the finding respecting Collier and Elberg (generating plant employees) even though as a matter of law it did not believe said findings to be supported by substantial evidence.

What else can one make of such language in the final opinion as the following?

> "We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. See *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440; *Edison Co. v. Labor Board, supra*, 229, 230.
>
> In *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206, the Court said: '* * * Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act.' This language was quoted in *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584.

> * * * Under these decisions we are powerless to disturb the Board's findings with respect to Collier and Elberg."

True in its final opinion the Court did hold that the findings as to radio station WFBM and radio technician Renmaker were not supported by substantial evidence, but the same opinion conclusively discloses that there was not a similar review to determine the question whether the findings relating to the generating plant employees are supported by substantial evidence. It is plain that the lower court failed to make its own independent determination of the law question whether the findings relating to generating plant employees are supported by substantial evidence. On this subject the second opinion reads to all intents the same as did the first.

It is also clear that if the whole picture of the facts in evidence (pp. 7-22, petitioner's brief) is considered, it cannot reasonably be said that the findings relating to the generating plant employees are supported by substantial evidence. It is also clear from the Board's order itself that it is not based "on the totality of the Company's activities during the period in question". Instead, the findings and order ignore important facts and rest on distortions of fragments. This Court recently reversed a case under the Act where it was not clear that the Board had considered "the whole complex of activities" in reaching its conclusions. *N. L. R. B. v. Virginia Electric & Power Co.* — U. S. —; 86 L. Ed. 306, 311. In the instant case it is clear that th Board did not consider "the whole complex of activities" in respect to the discharge of Collier and Elberg or in respect to interference with rights of generating plant employees. It is also clear that the lower court erroneously deemed itself balked from going into the matter and giving relief to which the petitioner is entitled by reason

of the lower court's misinterpretation of the decisions of the Supreme Court.

Question number 2, as it is stated in the petition (p. 32) is the basis for specification of error number 2 (p. 23, petitioner's brief), and is the subject matter of Proposition 2 (pp. 27-29, petitioner's brief). Said Proposition 2 is argued at pages 44-47 of petitioner's brief. That question is not, as stated in the brief for the Board, whether opinions are required to set out "the evidence supporting the Board's findings." The question rather is, (p. 32, petition) whether the failure by the lower court to make its independent determination of the question of sufficiency of evidence *and* to point out "legally sufficient evidence" constitute such a departure from the accepted and usual course of judicial proceedings in this type case, so as to call for the exercise of this Court's power of supervision. At pages 44-47 of petitioner's brief it is shown that the usual and accepted course is for the reviewing court to make such independent determination and to point to evidence deemed legally sufficient to support the findings upheld. It is there also shown that the lower court did neither of these things in respect to the findings relating to generating plant employees. Petitioner believes said question number 2 is warranted by the record and merits consideration.

The remaining of the five questions presented is number 3, which is, whether said findings, including those subsidiary thereto (relating to generating plant employees), are supported by substantial evidence under the test of the established criterion. Said question is the basis for specification of error number 3 (p. 23, petitioner's brief) and is the subject matter of Proposition 3 (pp. 29-30, petitioner's brief). Said Proposition 3 is argued at pages 47-60 of petitioner's brief. It is there demonstrated that said

findings are as a matter of law not supported by substantial evidence but that they are contrary to all of the substantial evidence.

That question is important not only in this particular case, but in the administration of the Act as well, since the Board obviously did not consider such things as the company's authoritative policy of according its employees full freedom in the matter of joining, or not joining, labor organizations, or the undisputed fact that Collier and Elbreg had never informed anyone in the management that they belonged to C. I. O. and that the management had no knowledge that they were so affiliated until after they had been selected for lay off along with many others under economic necessity. An order not based on a consideration of all of the relevant facts should not be allowed to stand. *N. L. R. B. v. Virginia Electric & Power Co.*, — U. S. —; 86 L. Ed. 306, 311.

It is respectfully submitted that the questions presented by the petition for certiorari are warranted by the record and that they are of sufficient importance in the administration of the Act, as well as in this case, to merit consideration by the Supreme Court.

It is respectfully requested that the petition for certiorari be granted, and that upon review, the case be reversed as is in said petition prayed.

Respectfully submitted,

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